

Ky. Op. Atty. Gen. 10-ORD-179, 2010 WL 3565277 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

10-ORD-179

September 9, 2010

In re: Virgil Mullins/Eastern Rockcastle Water Association

Summary: Eastern Rockcastle Water Association violated [KRS 61.880\(1\)](#) in failing to issue a written response within three business days of receiving the request. ERWA ultimately agreed to provide the requested audit and related materials to its “members,” but violated the Act in denying access to the public without citing any legal basis for doing so.

Open Records Decision

At issue in this appeal is whether the Eastern Rockcastle Water Association violated the Kentucky Open Records Act in the disposition of the July 27, 2010, request jointly submitted by Virgil Mullins, Dennis Clark, Paul May, Steven Hill, and Gary Mason for “a copy of the 2009 Audit, the Auditor letter to the ERWA Board, and any materials and communications pertaining to this audit.” In failing to issue a written response within three business days, the ERWA violated the mandatory terms of [KRS 61.880\(1\)](#). Upon receiving notification of the instant appeal from this inaction, legal counsel for the ERWA advised his client “to permit members to inspect the 2009 Audit Report at their office.” [\[FN1\]](#) Because the ERWA has declined to clarify whether the audit and the related materials will also be provided to Mr. Mullins, who is not a “member,” and has also failed to cite a statutory basis for withholding it from the general public, including Mr. Mullins, the ERWA has not satisfied its burden of proof under [KRS 61.880\(2\)\(c\)](#) and must provide Mr. Mullins (or any member of the public upon request) with an opportunity to inspect the 2009 Audit Report and related materials, and provide him with a copy upon receipt of a reasonable copying fee (.10 per page) per [KRS 61.874](#).

Having received no response to their July 27 request, “which was hand delivered to the ERWA in Livingston, Kentucky” on July 28, Mr. Mullins initiated this appeal on behalf of the named individuals by letter dated August 9, 2010, noting that upon returning to the ERWA on August 5, they were informed by David Ballinger, ERWA President, “that the ERWA is a private organization and does not have to provide any information in response to Kentucky Open Records requests.” Although Mr. Mullins acknowledged that the ERWA “is incorporated as a not-for-profit organization,” he went on to explain the reasons that he and the others “believe that an audit by the Kentucky State Auditor would establish that the ERWA does in fact receive at least 25% of its total funds from the State and local authorities.” Because the ERWA has not challenged the assertion that it can be properly characterized as a “public agency” within the meaning of [KRS 61.870\(1\)\(h\)](#), either initially or in response to Mr. Mullins' appeal, nor does the record on appeal contain any evidence to suggest as much, this office proceeds on the assumption that the ERWA is a “public agency” for purposes of the Open Records Act. [\[FN2\]](#)

*2 Upon receiving notification of Mr. Mullins' appeal from this office, legal counsel for the ERWA advised this office by letter dated August 17, 2010, that he advised his client "to permit members to inspect the 2009 Audit Report at their office, and the Association has agreed to do this." [FN3] On the same day, this office contacted Mr. Cox via e-mail to clarify whether the requested letter and/or "materials and communications pertaining to this audit," would also be provided as the agency had not addressed either in responding to Mr. Mullins' appeal. Mr. Cox responded via fax on August 23, 2010, to the undersigned counsel's August 17 e-mail as well as the follow-up e-mails dated August 18 and August 20, advising that he "replied or tried to reply to both." Mr. Cox indicated that his client had "agreed to permit *any member* to view the requested documents. Mister Mullins is not a member, but the other listed individuals are." (Emphasis added.) The undersigned counsel then spoke with Mr. Cox by telephone on August 23, to clarify whether the ERWA was implicitly denying the request as to Mr. Mullins and, by extension, the general public, and Mr. Cox advised that his client was planning to send a supplemental response by August 26; however, this office did not receive any further information from the ERWA or Mr. Cox. Because the ERWA has implicitly denied the request as to Mr. Mullins and the general public, in agreeing to provide only "members" with access, but has not cited any legal basis for doing so, despite having multiple opportunities, the Attorney General finds that the ERWA's ultimate disposition of the request was both procedurally and substantively deficient.

Public agencies must comply with the procedural and substantive provisions of the Open Records Act regardless of the requester's identity or purpose in requesting access to the records, generally speaking. [FN4] More specifically, KRS 61.880(1) dictates the procedure which a public agency must follow in responding to requests made under the Open Records Act. In relevant part, KRS 61.880(1) provides that upon receipt of a request, a public agency "*shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays ... whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period of its decision.*" (Emphasis added.) A "response denying, in whole or in part, inspection of any record *shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.*" (Emphasis added.) When construing the mandatory language of this provision, the Kentucky Court of Appeals observed that the "language of [KRS 61.880(1)] directing agency action is exact. It requires the custodian of records to provide *detailed and particular information* in response to a request for documents.... [A] limited and perfunctory response [does not] even remotely comply with the requirements of the Act-much less amount [] to substantial compliance." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996); 04-ORD-208.

*3 By its express terms, KRS 61.880(1) requires public agencies to issue a written response within three business days of receiving a request. In general, public agencies cannot postpone this deadline. 04-ORD-144, p. 6. "The value of information is partly a function of time." *Fiduccia v. U.S. Department of Justice*, 185 F.3d, 1035, 1041 (9th Cir. 1999). As the Attorney General has frequently noted, this is a "fundamental premise of the Open Records Act, underscored by the three day agency response time codified at KRS 61.880(1)." 01-ORD-140, p. 3. Here, the ERWA initially failed to issue a written response of any kind, which constitutes a violation of KRS 61.880(1). Its belated response did not cite a statutory basis for its apparent denial of the request as to Mr. Mullins/the general public. As the Attorney General has consistently recognized, the procedural requirements of the Open Records Act "are not mere formalities, but are an essential part of the prompt and orderly processing of an open records request." 04-ORD-084, p. 3, citing 93-ORD-125, p. 5.

A public agency must cite the applicable statutory exception, if any, and provide a brief explanation of how that exception applies to the records, or portions thereof withheld per KRS 61.880(1), in order to satisfy the burden of proof imposed upon public agencies per KRS 61.880(2)(c). 04-ORD-106, p. 6; 04-ORD-080. As the Attorney

General has consistently recognized:

While neither this office nor the Kentucky courts have ever required an itemized index correlating each document withheld with a specific exemption, such as that required by the federal courts in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), we believe that [an agency] is obligated to provide particularized justification for the withholding of documents, or groups of documents, which are properly excludable [footnote omitted], and to release any documents which do not fall squarely within the parameters of the exception and are therefore not excludable.

97-ORD-41, p. 6; 04-ORD-106. In the same vein, this office has observed:

Although there is no clear standard of proof under the Kentucky Open Records Act, with one narrow exception [codified at [KRS 61.872\(6\)](#), which requires clear and convincing evidence to support denials resulting from unreasonably burdensome requests] it is clear that the *burden* of proof in sustaining public agency action in the event of an appeal to the Attorney General, or to the circuit court, is on the agency. [KRS 61.880\(2\)\(c\)](#); [KRS 61.882\(3\)](#). *It is also clear that a bare assertion relative to the basis for denial ... does not satisfy the burden of proof....*

00-ORD-10, pp. 10-11, citing 95-ORD-61, p. 2 (emphasis added).

The ERWA has not made even a “bare assertion” to justify its denial of the request as to Mr. Mullins/the general public, despite having multiple opportunities; first, upon receipt of the request, next upon receipt of the notification of appeal from this office, and finally in response to subsequent inquiries by the undersigned counsel. Having failed to provide any legal basis for denying access, the ERWA must also provide Mr. Mullins with access to any existing record(s) in the custody of the agency which are responsive to his request as he must be treated just like “members” of the ERWA under the Open Records Act. “[T]he Legislature clearly intended to grant any member of the public as much right to access to information as the next.” *Zink v. Commonwealth of Kentucky*, 902 S.W.2d 825 (Ky. App. 1994)(citation omitted). In other words, “all persons have the same standing to inspect and receive copies of public records, and are subject to the same obligations for receipt thereof.” 94-ORD-90, p. 4.

*4 A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to [KRS 61.880\(5\)](#) and [KRS 61.882](#). Pursuant to [KRS 61.880\(3\)](#), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

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[FN1]. This office has “consistently held that final audit reports are public documents and are therefore subject to inspection.” 98-ORD-174, p. 2; OAG 76-633; OAG 82-340; OAG 84-225; OAG 91-72; 93-ORD-125.

[FN2]. Again, the ERWA did not raise this argument, but in 09-OMD-081 this office concluded that it was not a “public agency” for purposes of the Open Meetings Act. Our decision is based exclusively on the written record in accordance with [KRS 61.880\(2\)\(a\)](#). However, the Attorney General has long recognized “that a private, non-profit corporation may be a public agency for purposes of the Open Records Act, though it is not a public agency for purposes of the Open Meetings Act.” 01-OMD-134, p. 5, n. 1. More specifically, the definition of “public agency” found at [KRS 61.805\(2\)](#) does not include “[a]ny body which derives at least twenty-five percent

(25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds.” [KRS 61.870\(1\)\(h\)](#). Private, nonprofit corporations are public agencies for purposes of the Open *Records* Act if they derive at least 25 percent of the funds they expend in the Commonwealth from state or local authorities.

[FN3]. To clarify, when a public agency provides a requester with an opportunity to inspect records, the “requester enjoys a corollary right to obtain copies” of those records. 02-ORD-168, p. 7, citing [KRS 61.874\(1\)](#) and OAG 89-40. See 04-ORD-053. The ERWA may, of course, require advance payment of a reasonable copying fee (ten cents per page) per [KRS 61.874\(1\)](#) and (3). See *Friend v. Rees*, 696 S.W.2d 325 (Ky. App. 1985).

[FN4]. See 02-ORD-132, p. 7, citing *Zink v. Commonwealth*, 902 S.W.2d 825, 828 (Ky. App. 1994).

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